No. 14-280

Supreme Court, U.S.
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In The

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

REPLY BRIEF

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STATEMENT IN REPLY

While Respondent, the State of Louisiana, argues *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012) is not retroactive, it confesses jurisdiction in this Court for a "determination of whether new pronouncements of the United States Constitution must be applied to cases that have already become final." Resp. at. 6. Respondent further agrees with Petitioner, Henry Montgomery, that certiorari should be granted. (Absent this Court's intervention, a State seeking review of a judicial misconstruction of the federal standard enunciated in *Teague* [*v. Lane*, 489 U.S. 288 (1989)] has no redress in federal habeas). Moreover, Respondent argues the merits of Montgomery's application while failing to articulate any reason why this Court should not grant review.

In fact, Respondent recognizes the split of authority on the retroactivity issue before this Court, citing 11 state and 12 federal cases finding against retroactivity, and 12 state and eight federal cases in favor of retroactivity. Resp. at 13-14.

Consequently, Petitioner, Henry Montgomery, asserts the case presents an exceedingly important question that should be resolved by this Court. Review of this issue – which has led to a nationwide division between state and federal courts (and in the case of the United States Fifth Circuit, a panel-split, *compare Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. 2013) with *In re Simpson*, 555 F.App'x 369

(5th Cir. 2014)) – is proper under each reason considered by this Court. Sup. Ct. R. 10(a-c).

ARGUMENT IN REPLY

Miller declares a new substantive rule that mandates courts apply a new procedure in the sentencing of juveniles. It is rooted within the first exception of the *Teague* plurality opinion – it "announces a new rule" because "the result was not dictated by precedent existing at the time the defendant's conviction became final." *Chaidez v. United States*, ___ U.S. ___, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013). A new rule is substantive if it prohibits the States from criminalizing certain conduct or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Saffle v. Parks*, 494 U.S. 484, 494, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). New substantive rules apply retroactively on collateral review because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schiro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). By contrast, a rule that merely regulates the manner in which a defendant is adjudicated guilty is procedural. *Id.*

Miller creates a new, substantive rule. It was not dictated by cases or precedent that existed at the time Montgomery's conviction became final. And contrary to the state's position, *Miller* does not prevent the state from punishing a juvenile convicted of murder (Resp. at 19). But it does require the court to consider the circumstances of the crime that mitigate against a sentence of life without parole. *Miller*, 132 S.Ct. at 2468. In other words, *Miller* plainly excludes a certain class of individuals – juveniles – from specific punishment – life without parole absent individualized considerations of youth. While *Miller* does not create a categorical ban on punishment of life in prison without the possibility of parole – the only option for a sentencing court in 1969 – it now requires a sentencing court to take into account that children (juveniles) are different and to consider how these differences ameliorate against irrevocably sentencing them to a lifetime in prison. *Id.*, 132 at 2469. *Miller* is substantive because it affects the class of persons the law punishes, not merely regulating only the manner of determining the defendant's culpability. *Schiro, supra*.

As a result, while *Miller* contains procedural aspects as well as substantive aspects, it is clear that *Miller* does not merely regulate the manner in which courts sentence juveniles to life in prison without parole; it also controls whether they may do so at all. *Miller* is therefore substantive and retroactive. *See*

Grant v. U.S., No. 12-6844, 2014 WL 5843847 (D.N.J. Nov. 12, 2014).

Miller's retroactivity is also grounded in its application. Although the state of Arkansas elected not to raise *Teague* in the companion case of Kuntrell Jackson, nothing prevents this Court from refusing to consider Kuntrell Jackson's petition. Rather, this Court decided that although on collateral review, Jackson deserved to be treated the same as Miller. Consolidating the cases for review comported with another important *Teague* rule affecting equal justice: If one petitioner gets the benefit of a new rule, then the rule should apply retroactively to others similarly situated as any other approach would be inequitable. *Teague* 489 U.S. at 315. In other words, the Court does not necessarily consider only the legal stage where the petitioner sits, but whether the "harm caused by the failure to treat similarly situated defendants alike " would "hardly comport[s] with the ideal of administration of justice with an even hand." *Id.*

CONCLUSION

The petition for writ of certiorari should be granted. The obvious division among the state and federal judiciary demonstrates the need for "uniformity of decisions throughout the whole United States, upon all subjects within [its] purview." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 347-348, 4 L.Ed. 97

(1816). The question of whether *Miller* should be applied retroactively to those condemned as juveniles to die in prison is an important question that needs resolution by this Court.

Respectfully submitted,

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